

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

YAFESSA JOHNSON,

Petitioner,

v.

CIVIL ACTION NO. 5:08-cv-1126
(Criminal No. 5:06-cr-00094)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the Court is Petitioner Yafessa Johnson's motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence. This action was referred to the Honorable R. Clarke VanDervort, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted findings of fact and recommended that the court deny Petitioner's § 2255 motion.

Neither party has filed objections to the Magistrate Judge's findings and recommendation.

Accordingly, the court **ADOPTS** and incorporates herein the findings and recommendation of the Magistrate Judge, and **DENIES** the petitioner's § 2255 motion.

The Court also notes that Petitioner's requested relief is likely **MOOT**. Although Petitioner was "in custody" when she filed the instant motion and remains "in custody" because she is currently serving a term of supervised release, *see United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999) (individual on supervised release is "in custody" for purposes of § 2255), there exists no

live controversy upon these facts. Petitioner attacks only the calculation of her sentence of imprisonment, based on an amendment to the U.S. Sentencing Guidelines, and particularly the calculation of her criminal history points. (Docket 55 at 1 (“I am requesting that the Judge remove the 4 point(s) from my criminal history and correct my sentence accordingly.”).) Petitioner does not challenge her conviction. Even were the Court to agree with Petitioner, it is precluded from granting her sought relief because Petitioner was released from federal prison on January 14, 2011, upon the Government’s motion to reduce her sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. (Docket 66 in Case No. 5:06-cr-00094-01.) Re-calculating Petitioner’s criminal history points, as she requests, will not alter her term of supervised release or any other aspect of her remaining sentence. There are no remaining consequences to Petitioner that a favorable decision might impact, and the motion is therefore **DENIED AS MOOT**.

The court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge VanDervort, counsel of record, and any unrepresented party.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: August 10, 2011



THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE